Nos. 76-569 and 76-570

In the Supreme Court of the United States

OCTOBER TERM, 1976

NEW YORK SHIPPING ASSOCIATION, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A79-A96)[1] is reported at 537 F. 2d 706. The decision and order of the National Labor Relations Board (Pet. App. A58-A78) and the decision of the administrative law judge (Pet. App. A1-A57) are reported at 221 NLRB No. 144.

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[1] "Pet. App." refers to the separate joint appendix to the petitions.

JURISDICTION

Following denial of a petition for rehearing on August 6, 1976 (Pet. App. A97-A98), the judgment of the court of appeals (Pet. App. A99-A100) was entered on September 9, 1976. The petitions for a writ of certiorari were filed on October 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that certain provisions in the collective bargaining agreement between petitioners were designed to enlarge work opportunities for employees in the unit rather than to preserve or reclaim the work of that unit, and thus violated Section 8(e) of the National Labor Relations Act.

2. Whether the Board properly found that petitioner in No. 76-570 violated Section 8(b)(4)(B) of the Act by enforcing the provisions.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*, are set forth at pages 3-4 of the petitions.

STATEMENT

A. *Background*

Petitioner New York Shipping Association, Inc. (NYSA) is an association of steamship lines carrying cargo and passengers into and out of the Port of New York, and of stevedore contractors employing longshoremen to load and unload ships in that port. NYSA bargains on behalf of its members with petitioner International Longshoremen's Association (ILA), the bargaining representative

of the longshoremen and related craftsmen whose traditional and principal work has been to load and unload in the Port of New York ships belonging to NYSA members.[2]

Before World War II most solid cargo moving over the New York docks was handled on a piece-by-piece basis by longshoremen represented by ILA. Truckers delivered loose cargo to the pier and removed it from their vehicles, and longshoremen then placed the cargo on drafts or pallets, or into small boxes, before loading it aboard ship. Cargo from incoming ships was broken down by longshoremen and picked up at the pier for delivery to the ultimate consignee.

In the late 1940's and early 1950's the practice began of stuffing loose cargo into 8-foot long wooden boxes (called Dravo containers) and 20-foot long metal containers for shipment to and from Puerto Rico. During this period less-than-container-load (LCL) and less-than-trailer-load (LTC) cargo received by Valencia-Baxt Express, Inc. (Valencia) was consolidated into these types of

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[2]The findings of fact of the administrative law judge (Pet. App. A2-A35) are based upon a stipulation, which incorporates the records of two injunction proceedings brought against NYSA and ILA under Section 10(*l*) of the Act, 29 U.S.C. 160(*l*) (*Balicer* v. *International Longshoremen's Ass'n, AFL-CIO and New York Shipping Ass'n*, 364 F. Supp. 205 (D.N.J.), affirmed, 491 F. 2d 748 (C.A. 3), and *Balicer* v. *International Longshoremen's Ass'n, AFL-CIO and New York Shipping Ass'n*, 86 LRRM 2559 (D. N.J.)), and is supplemented by affidavits submitted to the Board (A. 53a-60a). ("A." designates the appendix in the court of appeals.) The Board did not disturb the findings of fact, and there is no factual dispute here. See NYSA Pet. 4. Separate citations to the record have been omitted except where this statement refers to facts not mentioned by the administrative law judge or the Board.

containers by Valencia's employees at its off-pier facility (A. 102a, 105a, 794a).[3] The containers then were trucked by Valencia's employees to the pier and placed directly aboard ship by longshoremen. During the same period, when necessary to perform their traditional and principal loading and unloading work, longshoremen also stuffed and stripped boxes and containers on the piers; they did so, however, only with respect to cargo sent directly to the pier in loose or bulk form by the steamship lines' customers (A. 845a, 848a).

Consolidated and Twin are non-vessel-owning common carriers or freight "consolidators" that operate off-pier consolidation facilities located within 50 miles of the Port of New York. Their employees, who are represented by different locals of the Teamsters Union, consolidate LCL and LTL cargo that has been sent to their facilities by customer-consignors for shipment in containers between New York and Puerto Rico. The cargo is stacked or "stuffed" into 40-foot long containers or trailers supplied to the consolidators by the NYSA-member steamship companies serving Puerto Rico.[4] The full containers are trucked several miles from the off-pier facility to the pierside area of the NYSA-member steamship line, where ILA-represented longshoremen load the containers onto the ships bound for Puerto Rico. When a ship arrives in New York

[3] In 1965 Consolidated Express, Inc. (Consolidated), one of the charging parties before the Board, succeeded to the off-pier consolidation operations begun by Valencia in 1949 (Pet. App. A24-A25); Twin Express, Inc. (Twin), the other charging party before the Board, entered the consolidation business in 1967 (*id.* at A29-A31).

[4] These are Sea-Land Service, Inc. (Sea-Land), Seatrain Lines, Inc. (Seatrain), and Transamerican Trailer Transport, Inc. (TTT). Because their container ships can carry only certain kinds of specially-designed containers or trailers, these ship lines furnish the empty receptacles to Consolidated and Twin (A. 728a).

from Puerto Rico, the incoming container is unloaded from the vessel by longshoremen and then trucked by the consolidator's employee to its off-pier facility. There the cargo is removed or "stripped" from the container, separated, and then delivered to the ultimate consignee.

In 1959, after a strike protesting the increased use of large containers in the Puerto Rico trade, ILA and NYSA agreed that ILA would not restrict the handling of any type of container by NYSA-member steamship lines or stevedores, including consolidator-stuffed LCL and LTL containers. NYSA agreed, in turn, to pay a royalty on containers stuffed or stripped away from the pier by non-ILA labor. NYSA also agreed that ILA labor would perform all container work done by NYSA members for their own account, whether performed at the pier or by NYSA members' subcontractors.[5] For 14 years (from 1959 to 1973) ILA-represented longshoremen usually loaded containers directly aboard ship without rehandling at pierside the already-consolidated LCL or LTL cargo. The only exceptions occurred during labor disputes between contracts (Pet. App. A62-A63).

B. *The 1969 Rules on Containers, as Supplemented in 1973*

In 1967 ILA demanded that its longshoremen stuff and strip *all* containers crossing the piers. In February 1969, after a lengthy strike, detailed provisions governing containerization—the "Rules on Containers"—were agreed upon, and since then have appeared, as modified, in every NYSA-ILA contract. The Rules on Containers established a system under which ILA-represented longshoremen working at the piers were to strip and restuff all LCL

[5] The 1959 agreement provided that "Any employer shall have the right to use any and all types of containers without restriction or stripping by the union" (A. 208a-209a). See Pet. App. A62.

and LTL cargo in containers owned or leased by NYSA members and originating within 50 miles of the Port of New York—even if the containers already had been stuffed off the pier by consolidators and thus were ready for immediate loading. If the steamship line failed to have its longshoremen perform such work, the line was required to pay liquidated damages into the Container Royalty Fund.[6]

Between 1969 and early 1973, despite the Rules on Containers, containers stuffed by Consolidated and Twin continued to be loaded on vessels without being stripped and restuffed by ILA-represented longshoremen (Pet. App. A28-A29, A30). In early January 1973, however, ILA and CONASA[7] executed the "Dublin Supplement" to the Rules. The Dublin Supplement provided that LCL and LTL consolidation work formerly performed off-pier by non-ILA labor now must be performed on-pier by ILA labor.[8] Under the Dublin Supplement all consolidated LCL and LTL cargo outbound from New York must be stripped from the consolidator's container and restuffed, at the steamship line's expense, by ILA labor at the pier, or liquidated damages must be paid. To prevent evasion of this rule, steamship lines are forbidden to supply empty containers to off-pier consolidators who attempt to operate as they had in the past. All inbound containers received in New York must be stripped by ILA labor at the pier.

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[6]The relevant portions of the Rules on Containers are set out at Pet. App. A19-A21.

[7]In 1970 NYSA joined the Council of North American Shipping Associations (CONASA), an association representing shipping associations operating from Massachusetts to Virginia. Since then CONASA has bargained with ILA over certain issues, including containerization.

[8]The relevant portions of the Dublin Supplement are set out at Pet. App. A22-A23.

In March 1973 Sea-Land and Seatrain stopped supplying empty containers to Consolidated and Twin, and TTT followed suit in April 1973. The three steamship lines were assessed a total of approximately $230,000 in liquidated damages (A. 882a) for violations of the Dublin Supplement occurring before then. On April 13, 1973, NYSA and ILA issued a joint notice to all NYSA members, announcing that steamship lines had been assessed liquidated damages for violating the Rules with respect to containers stuffed or stripped at the premises of 14 named consolidators, including Consolidated and Twin (Pet. App. A66).

C. *The Decisions Below*

The Board concluded that both petitioners violated Section 8(e) of the Act by maintaining and enforcing the Rules on Containers and the Dublin Supplement, and that petitioner ILA violated Section 8(b)(4)(B) of the Act by threatening to assess and assessing liquidated damages against Sea-Land, Seatrain, and TTT with an object of forcing them to cease doing business with Consolidated and Twin (Pet. App. A73), and it entered an appropriate remedial order (Pet. App. A74-A78). The Board acknowledged that genuine work preservation is protected primary activity (*id.* at A67-A68), but it found that petitioners were not attempting to preserve or reclaim work for the NYSA-ILA unit, but rather were seeking to enlarge the work opportunities for employees in that unit.

The Board concluded (Pet. App. A69) that "the on-pier stripping and stuffing work performed by longshoremen as an incident of loading and unloading ships does not embrace the work traditionally performed by Consolidated and Twin at their own off-pier premises." It explained (*ibid.*; footnote omitted):

The traditional work of the longshoremen represented by ILA has been to load and unload ships. When necessary to perform their loading and unloading work, longshoremen have been required to stuff and strip containers on the piers.

Similarly, for many years, maritime cargo has been sorted and consolidated off the docks by companies employing teamsters and unrepresented employees. With the advent of vessels designed exclusively to carry the large containers presently in use, these consolidating companies, such as Consolidated and Twin, have continued to consolidate shipments into containers prior to their placement aboard the vessels. The consolidators generate such work themselves, performing it not on behalf of the employer-members of NYSA but for their own customers who have goods to ship. Furthermore, they perform this consolidation work at their own off-pier premises, with their own employees who are outside the unit represented by ILA, and who fall within the coverage of separate collective bargaining agreements, under which they are represented by other labor organizations.

A divided court of appeals enforced the Board's order. It concluded that the Board stated "the essence of the matter clearly, succinctly, and correctly" (Pet. App. A89) and that its decision "is supported by substantial evidence and by sound analysis" (*id.* at A91).

ARGUMENT

1. *National Woodwork Manufacturers Association* v. *National Labor Relations Board*, 386 U.S. 612, held that whether an agreement restricting business relations between two persons violates Section 8(e) of the National Labor Relations Act depends upon "whether, under all

the surrounding circumstances, the Union's objective was preservation of work for [the unit] employees, or whether the agreements * * * were tactically calculated to satisfy union objectives elsewhere" (386 U.S. at 644; footnote omitted). If the agreement has the former objective, it is primary and lawful; if it has the latter objective, it is secondary and unlawful.

Unions and employers therefore lawfully may agree that work normally performed or "fairly claimable" by employees in the bargaining unit will be performed only by unit members; such provisions have the valid, primary purpose of protecting the jobs of the employees in that unit. *Meat and Highway Drivers, Local 710* v. *National Labor Relations Board*, 335 F. 2d 709, 713 (C.A.D.C.). On the other hand, they may not agree to acquire for the employees of the primary employer work that is " 'neither unit work nor fairly claimable as unit work' " (*Sheet Metal Workers, Local 223* v. *National Labor Relations Board*, 498 F. 2d 687, 696 (C.A.D.C.)).[9] Such agreements are unlawful because they reach beyond the primary bargaining unit to acquire work historically performed by employees of another employer in another work unit.

The basic question presented by the petitions is whether the Board properly concluded that the Rules on Containers, as modified by the Dublin Supplement, sought to enlarge the work opportunities for the NYSA-ILA bargaining unit, rather than merely to preserve the pierside container work traditionally performed by employees in that unit. Such an issue, involving only the

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[9]See *National Woodwork*, *supra*, 386 U.S. at 648 (Harlan, J., concurring): "[this is] not a case of a union seeking to restrict by contract or boycott an employer with respect to the products he uses, for the purpose of acquiring for its members work that had not previously been theirs."

application of settled principles to the particular facts of this case, does not warrant review by this Court. The decision of the court of appeals sustaining the Board's resolution of this issue is in accord with that of the District of Columbia Circuit in *Pacific Maritime Association* v. *National Labor Relations Board*, 515 F. 2d 1018, certiorari denied, 424 U.S. 942, sustaining the Board's evaluation of the similar container rules for West Coast ports at issue in *International Longshoremen's and Warehousemen's Union (California Cartage Co.)*, 208 NLRB 994.[10] There is no more reason for this Court to grant review in the instant case than there was in *Pacific Maritime*.

In making its assessment the Board properly concentrated on the work done in the past at off-pier premises. The Board analyzed the ILA members' historical work functions and found that they did not include the work performed by the off-pier consolidators. They performed, rather, functions for the convenience of shippers who did not otherwise consolidate their shipments. By arguing that ILA members performed some broader function, petitioners are taking issue with the inferences the Board drew from the facts. Such an issue does not warrant this Court's review where, as here, the court of appeals has concluded that the Board's finding was supported by substantial evidence. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

The conclusion of the court of appeals is correct. The traditional work of longshoremen represented by ILA has been to load and unload ships. To the extent they

[10]Petitioners' argument (NYSA Pet. 12, ILA Pet. 13) that the District of Columbia Circuit would have decided the instant case differently is incorrect, as *Pacific Maritime* demonstrates.

have filled or emptied containers at the docks, that work has been performed as an incident to their primary functions; traditionally stuffing and stripping has been performed by ILA members only for customers of the steamship lines who sent their LCL and LTL cargo in loose or bulk form directly to the docks. At the same time, off-pier consolidators traditionally have filled and emptied containers at their own premises, using employees represented by other labor organizations. These consolidators have generated that work themselves, performing it for their own customers who have goods to ship.

Petitioners say that ILA workers regularly stuffed and stripped containers; that is both the beginning and the end of their argument that the work at issue in this case is traditionally theirs. They overlook that there may be—as the Board found there were—two distinct "stuffing and stripping" markets: one for the convenience of steamship companies that must consolidate loose cargo sent to them by shippers, and one for the convenience of shippers who consolidate their cargo in other ways. It is neither contradictory nor unrealistic to conclude, as the Board did, that ILA workers traditionally have performed the stuffing and stripping required for the convenience of steamship companies, but have not traditionally performed other stuffing and stripping.

For a long time New York has had both on-pier and off-pier stuffing and stripping, and ILA workers traditionally have loaded pre-stuffed containers onto vessels. The question presented here is whether ILA now may demand, and NYSA may agree, that ILA members will perform all stuffing and stripping of LTL and LCL cargo,

even that portion of the work that they had traditionally not performed. The Board was entitled to conclude that they could not.[11]

2. There is no conflict among the circuits on the question presented here.

a. There is no conflict between the instant case and *Intercontinental Container Transport Corp.* v. *New York Shipping Association,* 426 F. 2d 884 (C.A. 2) ("*ICTC*"), upon which petitioners mistakenly rely (NYSA Pet. 15; ILA Pet. 15-16). *ICTC,* like the decision in this case, was decided by the Second Circuit; any inconsistency between the *dicta* in *ICTC* and the holding of the instant case would be for that court to reconcile. *Wisniewski* v. *United States,* 353 U.S. 901, 902.

In any event, the cases are readily distinguishable. In *ICTC* the plaintiff, an off-pier consolidator of LCL and LTL cargo that employed ILA labor, complained that NYSA and ILA had violated the antitrust laws by combining and conspiring to exclude it from membership in NYSA. The plaintiff did not argue that the Rules

[11]Petitioners argue (NYSA Pet. 12, ILA Pet. 21-22) that this case is similar to *National Labor Relations Board* v. *Enterprise Association,* No. 75-777, argued October 6, 1976. It is not. In *Enterprise* the Board concluded that the union had sought to preserve traditional unit work, and the only question was whether the union could exert pressure against an employer that had no right to control the disputed work. Here, it is unnecessary to reach the question of the right to control, because the Board found that the work was not traditionally performed by ILA members. The decision in *Enterprise* therefore will not affect the outcome of this case. See *Pacific Maritime Association, supra,* in which the District of Columbia Circuit, which disapproved the Board's decision in *Enterprise,* enforced the Board's order in a case similar to the present one.

on Containers and the Dublin Supplement were an unlawful work acquisition agreement; it argued, instead, that the Rules were used as a device to establish the sort of union-employer anti-competitive conspiracy that violates the Sherman Act.[12] The court of appeals held in *ICTC* only that the district court had erred in granting a preliminary injunction, because plaintiff had not shown that it could establish the requisite anti-competitive conspiracy at trial. As the court stated (426 F. 2d at 888):

> Thus it appears that, far from aiding and abetting a violation of the Sherman Act by a group of business men, the union here, acting solely in its own self-interest, forced reluctant employers to yield to certain of its demands.

Although the court observed in *ICTC* that the Rules on Containers had as their object "the preservation of work traditionally performed by longshoremen covered by the agreement" (*id.* at 887), the issue whether the Rules violated Section 8(e) of the National Labor Relations Act was not before the court, and thus it had no occasion to consider that question (see Pet. App. A82 n. 1).

b. The other cases relied upon by petitioner ILA (ILA Pet. 13-14) also do not conflict with the decision below.[13] In *American Boiler Manufacturers Association* v. *National Labor Relations Board,* 404 F. 2d 547

[12]See *Allen Bradley Co.* v. *Local Union No. 3,* 325 U.S. 797.

[13]Nor is the decision in the instant case inconsistent with *Pittston Stevedoring Corp.* v. *Dellaventura,* C.A. 2, No. 76-4042, decided July 1, 1976, certiorari granted December 6, 1976, *sub nom. Northeast Marine Terminal Co.* v. *Caputo* (No. 76-444) and *International Terminal Operating Co.* v. *Blundo* (No. 76-454), or any other case under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. (1970 ed. and Supp. V) 901 *et seq.* These decisions hold that stuffing and stripping

(C.A. 8), certiorari denied, 398 U.S. 960, the court held that a union could lawfully strike to "reacquire, as well as preserve, [unit] work" (404 F. 2d at 551); it made it clear, however, that its conclusion did not extend to agreements "to acquire work which unit employees had never performed or work which they may have performed in the past but have completely lost before the clause was negotiated" (*id.* at 552). In *Meat and Highway Drivers, Local 710* v. *National Labor Relations Board, supra,* the unit employees historically had performed on an exclusive basis the work sought to be recaptured (335 F. 2d at 712, 714); the NYSA-ILA unit employees involved here have never performed the disputed consolidators' container work. In *Canada Dry Corp.* v. *National Labor Relations Board,* 421 F. 2d 907 (C.A. 6), the disputed work was identical to the traditional work performed by unit employees (*id.* at 909); here ILA workers traditionally have done stuffing and stripping only for the convenience of the steamship line, and not for the convenience of the shipper and freight forwarder. The latter work always has been performed by the consolidators' employees.

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operations, at least when conducted by longshoremen who spend part of their time loading and unloading vessels, are of such a maritime character that they satisfy the "status" test for compensation established by 33 U.S.C. (Supp. V) 902(3). But, as we have indicated in the text, the fact that longshoremen traditionally have performed some stuffing and stripping does not mean that they traditionally have performed *all* stuffing and stripping. Petitioners cannot prevail in this case unless they can establish that they have a claim to all such operations, whereas the claimants in the compensation cases prevailed on a showing that some stuffing and stripping operations are so related to maritime commerce that the Longshoremen's Act applies. Moreover, the tests under the Longshoremen's Act—relationship to maritime commerce and physical location of the work performed—have no similarity to the question presented in this case, which is whether one employee unit rather than another has a traditional claim to perform particular work. It would make no difference under the Longshoremen's Act, whether the ILA-represented unit or some other unit traditionally performed the stuffing and stripping work in question. There is therefore no reason to defer disposition of the instant case ppnding the Court's decision in *Caputo* and *Blundo*.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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